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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, PETITIONER

v.

VANIS RAY ROBBINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 510 F.2d 301. The order of the district court (App. D, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on January 25, 1975. The gov-

ernment's timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 13, 1975 (App. C, *infra*). On June 2, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The extortionate collection of financial obligations is prohibited by 18 U.S.C. 894. In the middle of respondent's jury trial the district court directed the clerk to enter a "judgment of acquittal" on the ground that Section 894 does not prohibit the extortionate collection of gambling debts. The question presented is whether the Double Jeopardy Clause precludes the government from appealing that order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

18 U.S.C. 894(a) provides:

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

18 U.S.C. 3731 provides in relevant part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * * * *

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

An indictment returned in the United States District Court for the Eastern District of Kentucky charged respondent with utilizing extortionate means to collect a debt, in violation of 18 U.S.C. 894. The indictment did not specify the nature of the debt, but prior to trial the prosecution furnished the trial judge (but not respondent) with a pretrial memorandum narrating the circumstances of respondent's allegedly extortionate efforts to collect a gambling debt.

Respondent's trial commenced on January 9, 1974. Evidence presented by the government established that respondent had accepted a series of wagers from Michael Monopole, a bookmaker, as "layoffs" of

wagers made by one of Monopole's customers. The customer incurred large losses, which he did not repay; Monopole consequently was indebted to respondent for a sum in excess of $10,000 (Tr. 16-27). Respondent insisted upon repayment and, during the ensuing months, threatened Monopole with severe physical harm or death if repayment were not forthcoming (Tr. 36-39).

Respondent's defense apparently was that Monopole had not been placed in fear by his conduct (Tr. 3-4, 95-108). After the prosecution had rested its case, respondent moved for a "directed verdict in that there has not been established a *prima facie* case" (App. D, *infra*, p. 7a).[1] Counsel for the prosecution answered that the evidence showed "that there was, in fact, a loan made, an extension of credit, arising out of a gambling debt. I think that is not controverted in this case. The sole issue * * * is whether or not a reasonable man, or in this case Michael Monopole, the victim, had fear instilled in him as a result of the threats and the menacing manner in which [respondent] conducted himself * * *" (*ibid.*). The district court responded: "I don't have any doubt about the facts as far as that's concerned * * *" (*id.* at 8a).

However, the court then discharged respondent. It concluded that Section 894 does not prohibit the ex-

[1] Fed. R. Crim. P. 29 provides that a defendant can move for a judgment of acquittal at the close of the government's case. The district court properly treated respondent's motion for a directed verdict as a motion for a judgment of acquittal.

tortionate collection of gambling debts. The district court reasoned, in essence, that transactions between and among gamblers are not "commerce" because the transactions are illegal. If gambling transactions do not constitute "commerce," then the Commerce Clause does not confer upon Congress the power to regulate or forbid such events. The district court then concluded that because Congress would not have intended to legislate where it had no power, Section 894 could not be construed to forbid extortionate collection of gambling debts. It explained (App. D, *infra*, pp. 15a-16a):

> Now, this charge here of threatening to injure or kill * * * is a local offense possibly, but it doesn't interfere with interstate commerce because the man who was seeking to collect the debt had no authority in law to collect it. * * * [A] gambling transaction is not enforcible in law. So, consequently, there could be no interference with interstate commerce. Interstate commerce doesn't contemplate unlawful obtaining of money through violation of law.

The district court then dismissed the jury and directed the clerk to enter a "judgment of acquittal" (App. D, *infra*, p. 16a).

The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. In a brief *per curiam* opinion (App. A, *infra*) the court of appeals dismissed the appeal. After setting out the recently amended Criminal Appeals Act, the court wrote that "the above statute" [*sic*] had been discussed in

United States v. *Sisson*, 399 U.S. 267,[2] which, according to the court of appeals, held that the Double Jeopardy Clause bars the government from appealing any order resting upon facts outside the face of the indictment (App. A, *infra*, p. 2a).

Subsequent to the decision below, this Court decided *United States* v. *Wilson*, No. 73-1395, decided February 25, 1975; *United States* v. *Jenkins*, No. 73-1513, decided February 25, 1975; and *Serfass* v. *United States*, No. 73-1424, decided March 3, 1975. *Wilson* and *Serfass* held (*inter alia*) that *Sisson* had not been predicated on double jeopardy grounds and that the Double Jeopardy Clause does not prevent the United States from appealing certain orders based upon facts outside the indictment. In view of these holdings, the government petitioned for rehearing in the court of appeals, arguing that the court's reliance upon *Sisson* had been misplaced. The court denied this petition without opinion (App. C, *infra*).

REASONS FOR GRANTING THE WRIT

Serfass v. *United States*, *supra*, held that the United States is entitled to appeal a pretrial decision dismissing an indictment on the basis of facts outside the indictment. This case presents a question expressly reserved in *Serfass*: "whether a simi-

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[2] In fact, the Criminal Appeals Act had been amended after this Court's decision in *Sisson*, in part for the purpose of overturning the result of that case. *Serfass* v. *United States*, No. 73-1424, decided March 3, 1975, slip op. 15, n. 14.

lar ruling by the District Court after jeopardy had attached would have been appealable" (slip op. at 16). It is a question of great importance to the system of criminal justice.[3] In numerous criminal cases trial judges, after permitting a jury to be empaneled, dismiss an indictment or "acquit" a defendant on grounds that could have been litigated and decided before or after trial and that have nothing to do with the resolution of any disputed issue of fact. If the district court in this case had dismissed the indictment upon identical Commerce Clause grounds before trial *(Serfass)* or after trial *(Wilson)*, the government would unquestionably have been able to appeal. We submit that the government also should be able to obtain redress when the trial judge's legal ruling occurs in mid-trial and deprives both the government and the defendant of an opportunity for an adjudication by the jury, the only body capable of convicting the defendant. The public's interest in "fair trials designed to end in just judgments" (*Wade* v. *Hunter*, 336 U.S. 684, 689) is ill served when the trial judge—who lacks the jury's power to subject a defendant to the risk of conviction—is accorded un-

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[3] Because the Double Jeopardy Clause applies to the States, resolution of the issue presented herein would also affect the ability of States to appeal in similar circumstances. Many States are entitled by statute to appeal adverse legal decisions that terminate a trial. See, *e.g.*, New York Criminal Procedure Law § 450.20 (McKinney 1971); Conn. Gen. Stat. Ann. § 54-96 (Supp. 1973); Vt. Stat. Ann., Title 13, § 7403 (1974). The New York statute has been held unconstitutional in a recent decision. *People* v. *King*, Sup. Ct. App. Div., No. 12, decided May 15, 1975.

reviewable power to terminate an ongoing prosecution.

1. The Criminal Appeals Act permits the government to appeal from adverse decisions in criminal cases unless proceedings on remand, should the government prevail on appeal, would violate the Double Jeopardy Clause. *Wilson*, *supra*, slip op. at 4-7; *Serfass*, *supra*, slip op. at 6-10. The court of appeals apparently believed that, because jeopardy had attached when the jury was empaneled, further proceedings would be a forbidden second jeopardy. But the "conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial" (*Illinois* v. *Somerville*, 410 U.S. 458, 467; *Serfass*, *supra*, slip op. at 13).

Although respondent was "in jeopardy" when the district court terminated the proceedings against him, there are numerous instances in which a defendant can be tried again and again for the same offense.[4] This Court has upheld such retrials because compelling considerations of policy in a particular case or class of cases outweigh the interest of an accused in

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[4] See, *e.g.*, *Hopt* v. *Utah*, 120 U.S. 430, where, after having reversed three prior convictions, this Court affirmed the fourth; *United States* v. *Krulewitch*, 167 F.2d 943 (C.A. 2), where the defendant had been tried four times for the same offense and, as a result of a reversal by this Court (336 U.S. 440) was liable to yet a fifth trial; *United States* v. *Persico*, 425 F.2d 1375, 1385 (C.A. 2), certiorari denied, 400 U.S. 869, where the court rejected the claim that five trials, four of them necessitated by error in earlier trials, were too many.

avoiding multiple exposures to the criminal process. Where the second trial is justified by substantial interests of justice rather than by an attempt "to wear the accused out by a multitude of cases with accumulated trials" (*Palko* v. *Connecticut*, 302 U.S. 319, 328),[5] this Court has allowed an additional trial rather than an unsatisfactory termination of incomplete proceedings. Indeed, as Mr. Justice Cardozo wrote in *Palko* (*ibid.*):

> [The state] asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. [Citations omitted.] This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege * * * has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.[6]

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[5] *Benton* v. *Maryland*, 395 U.S. 784, overruled *Palko* on other grounds by holding the Double Jeopardy Clause applicable to the States. *Benton* did not deal with the issue whether the appeal in *Palko* would violate that Clause.

[6] To the extent that this statement suggests that the Double Jeopardy Clause does not preclude a government appeal from a verdict of acquittal by the *jury* infected by legal error in instructions or admission of evidence, the proposition has apparently been rejected in *Wilson* (slip op. at 18-20). The present case, however, entails a different and narrower right of government appeal as to which the *Palko* proposition sensibly applies and that was not foreclosed by anything said in the *Wilson-Jenkins-Serfass* trilogy.

Because the public's interest in fair trials designed to end in just judgments pervades the trial of criminal cases, this Court has in certain categories of cases allowed additional trials after earlier trials had terminated. Thus, a defendant can be subjected to the burden of a second trial when a mistrial has been declared, even if the mistrial was required because of prosecutorial or judicial negligence or misconduct.[7] For example, in *Gori* v. *United States*, 367 U.S. 364, this Court permitted the government to retry a defendant whose first trial was terminated by the judge after prosecutorial misconduct that allegedly denied the accused a fair trial. Similarly, when a trial proceeds to a judgment of conviction that is reversed on appeal or successfully attacked collaterally because of errors during trial, the prosecution can retry the accused. The retrial in such instances rests upon the conclusion that the defendant's right to be free of multiple trials is not absolute but must be weighed against (and at times subordinated to) other considerations of policy. See *United States* v. *Jorn*, 400 U.S. 470, 484 (Harlan, J.); *United States* v. *Tateo*, 377 U.S. 463, 466.

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[7] See, *e.g.*, *United States* v. *Perez*, 9 Wheat. 579 (jury unable to reach a verdict); *Simmons* v. *United States*, 142 U.S. 148 (discovery after trial began that a juror had been acquainted with the defendant); *Thompson* v. *United States*, 155 U.S. 271 (discovery that a juror was legally disqualified); *Illinois* v. *Somerville*, *supra* (discovery of a procedural defect that would have required reversal if the case had proceeded to verdict).

2. In determining whether a defendant may be tried again after a mistrial, appeal, or "acquittal," this Court has employed what may be described as "a flexible rule balancing protection of the individual against the state's interest in securing convictions" (Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 14 (1961)). Within this framework labels carry no talismanic significance; the interests are assessed for what they are, rather than for what the district court called them. See *United States* v. *Sisson*, 399 U.S. 267, 279, n. 7. It is consequently unimportant that an action may be called a "dismissal" rather than an "acquittal," or vice versa. *Wilson*, *supra*; *Serfass*, *supra*. So too, it is not controlling that the district court may have considered facts outside the face of the indictment or even facts introduced during a trial. *Wilson*, *supra*, slip op. at 13; *Serfass*, *supra*, slip op. at 10-16.

A line has been drawn instead at subjecting an accused for a second time to the risk of decision by a tribunal capable of convicting him, where the first fact-finder passed directly upon his guilt or innocence. Thus in *Jenkins*, *supra*, it was held impermissible to appeal a decision by a judge, in a jury-waived trial, to "acquit" an accused at the close of trial, where the government's appeal, if successful, would have required further fact-finding proceedings in the district court. And in *Breed* v. *Jones*, No. 73-1995, decided May 27, 1975, the Court concluded that it would be impermissible to try an accused as an adult

after a "juvenile" tribunal had convicted him. Retrial also would be foreclosed if the government sought to obtain for itself "another, more favorable opportunity to convict the accused" (*Gori*, *supra*, 367 U.S. at 369)—if, for example, it simply desired to present its case a second time in the hope facts resolved adversely to it in the first trial would be resolved favorably in the second. Cf. Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822, 1837-1841 (1974).

But respondent was never subjected to a decision by the jury, the only body capable of convicting him, and the jury resolved no facts either for or against him. Nor did the judge resolve any facts in his favor; the district court accepted the government's evidence at face value.[5] The decision here was purely one of law—a decision that could equally well have been made prior to trial.

We submit that until an accused has been subjected to the risk of conviction by a body authorized to convict him, additional prosecutorial efforts to subject him to that risk do not always transgress the Double Jeopardy Clause. The district court's action,

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[5] In a jury trial, the judge lacks the right to resolve factual questions. Although the judge is entitled to pass upon the sufficiency of the evidence, he is not entitled to resolve disputed questions of fact either for or against an accused; both the prosecution and the accused are entitled to have factual disputes resolved by the jury. *United States* v. *Weinstein*, 452 F.2d 704 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917; *United States* v. *Luciano*, 343 F.2d 172 (C.A. 4).

although styled an "acquittal," should be subjected to the same balancing analysis that is used when a mistrial is declared in mid-trial. *Somerville*, *Tateo*, and similar cases stand for the proposition that a hard and fast rule against retrial is not required by the Double Jeopardy Clause. In cases like the present one, no less than in cases of pretrial dismissal of the indictment and mid-trial declarations of mistrial, "the District Court was without power to make any determination regarding petitioner's guilt or innocence" (*Serfass*, *supra*, slip op. at 11). Where an accused has yet to be put to the risk of conviction, the prosecution ordinarily should be entitled to take such appeals as are necessary to ensure that, if the evidence is in fact sufficient to justify it, he is put to that risk at least once. There are too many cases like this one in which district courts make obvious legal errors.[9] That the legal error resulted in an

[9] The district court's views concerning Section 894 are palpably erroneous. The existence of an effect upon commerce depends not upon whether a State has declared an act illegal but upon the effect of acts (legal or illegal) upon the flow of goods, services and people among the States. If the district court were correct, it would turn the Supremacy Clause on its head—any State could oust the power of Congress by declaring a particular class of acts to be illegal. Yet many if not most federal laws deal with classes of commerce also subject to regulation or prohibition under the States' broad police power. Numerous federal laws forbidding certain conduct also illegal under state law have been upheld and applied. See, *e.g.*, the Travel Act, 18 U.S.C. 1952 (forbidding the use of interstate facilities in aid of racketeering activities illegal under state law) and the Hobbs Act, 18 U.S.C. 1951 (forbidding certain violent or extortionate activities invariably illegal under

"acquittal" rather than a "mistrial" should be of little moment.

3. We acknowledge, as we must, that the prevention of repetitious exposures to the cost and risk of trial is one important interest protected by the Double Jeopardy Clause. But the risks associated with trial primarily derive from the chance that the tribunal will convict the defendant and subject him to

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state laws). See, *e.g.*, *United States* v. *Staszcuk*, C.A. 7, No. 73-1869, decided May 16, 1975 (*en banc*), following the principle of *Perez* v. *United States*, 402 U.S. 146, 154, that when a statute which reaches a class of activities is within the federal power because it affects commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class."

Perez itself dealt with Section 894 and held the provision to be supported by Congress' power to regulate commerce. Section 894 was enacted in 1968 as part of the Consumer Credit Protection Act, 82 Stat. 161. On its face, this legislation prohibits the extortionate collection of any type of debt. 18 U.S.C. 891(1) defines an "extension of credit" as any loan or agreement for the payment of money "valid or invalid, and however arising * * *." And Section 891(4) provides that a repayment of credit includes any satisfaction of any "debt or claim * * * valid or invalid * * *." The Act could not be clearer; gambling debts illegal under state law are included within its purview and, in light of *Perez*, the district court had no power to excise them because it believed that they had a lesser impact on commerce. The legislative history bears out our argument that the legislation was intended to apply to gambling debts (see, *e.g.*, H.R. Conf. Rep. No. 1397, 90th Cong., 2d Sess. 31 (1968)). The only courts of appeals to consider the matter have agreed. *United States* v. *Keresty*, 465 F.2d 36 (C.A. 3), certiorari denied, 409 U.S. 991. *United States* v. *Briola*, 465 F.2d 1018 (C.A. 10), certiorari denied, 409 U.S. 1108. Cf. *United States* v. *Annerino*, 495 F.2d 1159, 1165-1166 (C.A. 7). *United States* v. *Burke*, 495 F.2d 1226 (C.A. 5).

punishment. For example, it is clear that there are no double jeopardy implications in allowing the government to appeal from an adverse pretrial ruling suppressing evidence, even though the court of appeals may remand for lengthy additional pretrial proceedings. Appearances in court are not fungible for double jeopardy purposes; some are more to be avoided than others.

If the government prevails on appeal, respondent will, to be sure, be subjected to additional cost, both monetary and psychological. But he will not be subjected to a forbidden increase in risk, for he never underwent the risk of conviction in the first trial. Again, the interest of the defendant in avoiding a second round of trauma and monetary cost must be balanced against the interest of the public in securing justice. The trial is not one designed to end in a "just judgment" if it can be irretrievably terminated at the hand of one who lacks the power to convict; an accused has no constitutionally protected interest in receiving the benefit of erroneous outcomes that can favor him but not the prosecution.

In many ways the institution of mid-trial dismissals is highly favorable to defendants. When the court correctly terminates unjustified proceedings, its order spares defendants the costs and uncertainties that the remainder of a trial would entail. Defendants actively seek out mid-trial terminations, as respondent did here. The relief granted was exactly what had been sought, albeit for a different reason. When a defendant expressly seeks a termination, he

should have to accept the risk of error. There is no reason why a defendant who willingly foregoes his opportunity of absolute acquittal by the jury should be insulated against further proceedings, while at the same time defendants are subject to a second trial when the first has ended in a mistrial over their vigorous objections (see, *e.g.*, *Gori*; *Somerville*). The prosecution should have more—not less—liberty to retry those whose first trial ended with their acquiescence.

Moreover, a defendant who sincerely desires to submit his case to the first jury in hope of an acquittal has a simple expedient available to him. He can ask the judge to postpone his legal ruling until after trial, thereby receiving an acquittal by the jury if one is forthcoming while obtaining the benefit of the judge's legal ruling (should the jury convict) and also minimizing the chance of a second trial.

4. There are impediments in the decisions of this Court to the analysis we have advanced above. The decision of the court of appeals is supported not by *Sisson*, which dealt with an Act of Congress now repealed, but by *Fong Foo* v. *United States*, 369 U.S. 141, and dictum in *United States* v. *Ball*, 163 U.S. 662. *Fong Foo* held that the Double Jeopardy Clause forbids the United States to appeal a mid-trial order by a trial judge directing the jury to acquit a defendant.

Fong Foo is distinguishable from the instant case and consistent with double jeopardy policy as that policy has since been explained by this Court. The

brief discussion of the issue in *Fong Foo* adverts to the statement in *Ball* regarding the finality of a *verdict* of acquittal (369 U.S. at 143). In *Fong Foo* there was such a verdict by the jury, albeit at the direction of the judge. Under present practice, however, directed verdicts are no longer used to terminate jury trials without independent deliberations by the jury; instead, as was done here, the court itself orders the entry of a judgment of acquittal, and factual issues are entirely unresolved by the fact-finder. Both *Wilson* and *Jenkins*, in considering the appealability of post-jeopardy terminations of trials favorable to the defendant, carefully draw this distinction and speak of the "verdict," on the facts, by the finder of facts, as the bar to further trial proceedings.

There are, moreover, additional reasons why the Court quite properly intimated in *Serfass* (slip op. at 16) that the question presented in *Fong Foo* should now be viewed as open to fresh consideration. *Fong Foo* was decided only a few months after *Gori*, in which the Court had held that a retrial was permissible following events at the first trial that were functionally indistinguishable from the events at Fong Foo's first trial. The only significant distinction—and the one that was apparently operative in bringing about the difference in result—was the label attached by the trial court to its action. But *Sisson*, *Wilson*, and *Serfass* have since made it clear that the label used does not dictate the double jeopardy anal-

ysis (see p. 11, *supra*), thus further undermining the continuing vitality of *Fong Foo*.

The conclusion that *Fong Foo* should not be allowed to control cases in which the court has terminated a jury trial prior to verdict is also dictated by a consideration of the pertinent "policies underlying the Double Jeopardy Clause," as those policies were spelled out in the *Wilson* decision (slip op. at 20):

(1) The government should not be allowed to seek to persuade a second trier of fact of a defendant's guilt after having failed with the first. This is the core policy, reflected by the holding in *Ball*; a government appeal in the instant case is wholly consonant with this policy, since there was here no failure by the prosecution to persuade a finder of fact of the respondent's guilt.

(2) The Clause is also designed to diminish the prosecutor's opportunities to correct weaknesses in his evidentiary presentation at the first trial. Whether there were any material weaknesses in the presentation in the instant case that could be corrected at a second trial is, of course, entirely speculative in light of the abrupt and wholly erroneous termination of the first trial. In any event, this policy is far from absolute, since the same hazard is always present in retrials following mistrials or successful appeals by a defendant.

(3) The defendant has a legitimate interest in the finality of a "verdict" of acquittal. That interest is not implicated here, since there was no such verdict. It is true that there was a judgment of acquittal (at

least, one so labeled), but the *Wilson-Jenkins-Serfass* trilogy make clear that there is no comparable interest in the finality of a judgment, as distinct from a verdict.

Finally, in view of the existence of *Fong Foo* as a precedent of this Court, we believe there is little to be gained by allowing the courts of appeals additional opportunities to consider this issue, since they would not appear to be free to bring to the question the kind of uninhibited inquiry that is within the power of this Court. Accordingly, if the issue is, as we submit, one fully worthy of the consideration of this Court, we believe there is little to be gained by postponing such consideration to another time or another case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1363

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

VANIS RAY ROBBINS, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed January 23, 1975

Before: PECK, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. Defendant-appellee was indicted for extortion in attempting to collect a gambling debt. A jury was empaneled, and after the government had rested, the appellee made a motion for a directed verdict of acquittal. The district judge, after reviewing the government's evidence, held that the statute involved (18 U.S.C. § 894) does not apply to the

collection of illegal gambling debts. Accordingly, he entered a judgment of acquittal.

The government perfected this appeal pursuant to 18 U.S.C. § 3731, maintaining that notwithstanding the fact that the judgment below was based upon facts established by evidence received at trial, there was no acquittal on the merits and it would not be double jeopardy to try appellee again. We do not agree. Section 3731 reads, in pertinent part, as follows:

> "In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, *except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.*" (Emphasis supplied.)

In interpreting the above statute, the Supreme Court has held that jeopardy has attached and that an appeal may therefore not be perfected from a determination that rests on evidence adduced at trial, *United States* v. *Sisson*, 399 U.S. 267 (1970). Relying on *Sisson*, this court stated that "[i]f the indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available." *United States* v. *Rothfelder*, 474 F.2d 606, 608 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973). In the instant case the decision of the district judge rested upon

evidence introduced by the government at trial, and therefore, no appeal lies from the judgment of acquittal.

The appeal is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1363

[Filed Jan. 23, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

VANIS RAY ROBBINS, DEFENDANT-APPELLEE

Before: PECK, LIVELY and ENGEL,
Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal is dismissed.

No costs taxed.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1363

[Filed May 13, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

VANIS RAY ROBBINS, DEFENDANT-APPELLEE

ORDER

Before: PECK, LIVELY and ENGEL, Circuit Judges.

Plaintiff-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At Covington, January 10, 1974)

No. 11,086

UNITED STATES OF AMERICA, PLAINTIFF

v.

VANIS RAY ROBBINS, DEFENDANT

TRANSCRIPT OF COURT'S RULING ON
MOTION FOR DIRECTED VERDICT

Before:

His Honor, Mac Swinford, Judge of Said Court

Appearances:

For the Plaintiff

Mr. Leonard Sands
Special Attorney
Department of Justice

Mr. James E. Arehart
Assistant U.S. Attorney

For the Defendant

Mr. Robert William Ent
Cincinnati, Ohio

Mr. R. Barry Wehrman
Covington, Kentucky

MR. SANDS: The government will rest at this time.

MR. ENT: We would at this time move for a directed verdict in that there has not been established a *prima facie* case.

THE COURT: What says the United States? I will hear the United States.

MR. SANDS: Your Honor, the government submits there has been a *prima facie* case, a very strong case, shown by the evidence that we have had in this case. The witnesses have testified that there was, in fact, a loan made, an extension of credit, arising out of a gambling debt. I think that is not controverted in this case.

The sole issue and the sole question, really, to go to the jury is whether or not a reasonable man, or in this case Michael Monopole, the victim, had fear instilled in him as a result of the threats and the menacing manner in which Mr. Robbins conducted himself in relation to the victim, Mr. Monopole. There is a witness to at least one of those threats. Mr. Monopole's father testified that he was picked up and driven around, in a circuitous manner, one of the gentlemen had a holster in his car, and all of this was calculated to get back to Mr. Monopole, Michael Monopole, the victim, to bring pressure to bear on him to pay these obligations, which are not enforcible in a court of law.

Counsel in his cross-examination could not understand from Mr. Monopole how he would allow Dick Bassett to get into him for a certain amount of

money, when the evidence has shown clearly, clearly shown, Mr. Robbins has allowed two betters to run up substantial sums of money, $44,000, and being that debts are not enforcible in a court of law, based upon Mr. Robbins' practice, the method that he employed in collecting these debts. I think the government has clearly shown that the threats were made, that they were made with the intent to instill some sort of fear in order to result in payment of the money in question, arising from the gambling debt as charged in the indictment.

That is really the sole question.

THE COURT: I don't have any doubt about the facts as far as that's concerned, but my idea is I've studied the history of this act—it has been decided, a Supreme Court case on it—I think that whatever the threats, whatever the circumstances were in that connection, there may be a violation of law, but it is not a violation of this law, it is a violation of a local law. This law was passed for an express purpose and that is because isolated instances of imposition upon legitimate trade were considered as contributing sufficiently to cause the Congress to make it a federal law that any such imposition upon interstate commerce was considered sufficient interference with interstate commerce to protect it and not permit an exploitation of what on the surface was a legitimate transaction. I can't believe that the Congress of the United States intended to place the responsibility of protecting gamblers from each other, that that should have anything to do with

interstate commerce. That is an illegitimate transaction, it is an unlawful enterprise. It is said here repeatedly in these cases, citing here the case of *Perez* v. *United States*: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." This case went to the Supreme Court with a dissent on the ground that it was a local violation and was not a constitutional law as far as anything other than protecting interstate commerce was concerned and the Supreme Court said this: "In the setting of the present case there is a tie-in between local loan sharks and interstate crime."

Now, this is not a "loan shark" case. This is nothing in the world but a gambling debt in which violence was threatened, according to the witnesses' statements if they didn't pay an uncollectible debt. If there is any imposition upon interstate commerce growing out of this transaction, then I don't know just how far you would have to go. The only basis, the only claim that is made—this act was passed in 1968—it is a new act—was to protect interstate commerce from fellows making loans on a legitimate transaction and charging exorbitant interest rates or taking some advantage in that way, not just two law violators engaged in violating the law, one asking the other to protect him from his counterpart in an illegitimate transaction all the way around.

The court expressly limits it to this. It holds the act constitutional with a dissent, as I say: "It is clear from the above"—and they go ahead and state

it—this is from the Second Circuit, this *Perez* case—and wrote an extended opinion, the Second Circuit speaking through Judge Feinberg: "It is clear from the above that the statute is a comprehensive federal attack on loan sharking. Accordingly, it would seem that the congressional finding that even purely intrastate extortionate credit transactions affect interstate commerce."

How are a couple of bookmakers fussing over a debt, gambling debt, affecting interstate commerce?

MR. SANDS: Your Honor, might I be heard?

THE COURT: Yes, sir.

MR. SANDS: Congress in designing the statutory scheme that became Title II of the Consumer Credit Protection Act intended ". . . a deliberate legislative attack on the economic foundation of organized crime." This attack was clearly meant to include extensions and collections of credit made in connection with illegal gambling. The Congress was fully aware of the notorious methods used to enforce these obligations.

In § 201 of Public Law 90-321, paragraph (a) (3), the Congress found:

> "Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless "directly affect interstate and foreign commerce."

THE COURT: I have read every bit of that. I know it as well as you have read it there and it

certainly is true, no question about it, although it has been seriously questioned by a judge of the Supreme Court. But it is speaking of an otherwise legitimate transaction. You are thinking here of protecting interstate commerce from those who would gouge or those who would take advantage, those who would extort on a legitimate transaction, but there is nothing legitimate about this, this whole thing is a violation of law. And the United States is going to come in here and pass an act that says, "If one gambler won't pay the other and makes a threat against him, we're going to prosecute him"?

MR. SANDS: Your Honor—

THE COURT: That just doesn't make sense. I sustain the motion. I'm not going to sit here and talk about protecting two gamblers, two bookmakers, from each other, growing out of this. I can find nothing in this act that in any way pertains to the situation which we have before us here.

MR. SANDS: Your Honor—

THE COURT: Yes, sir.

MR. SANDS: —I realize you have ruled, but I would like to ask the Court to consider the *Briola* case we cited in our memorandum, 465 F. 2d 1018.

THE COURT: What light does that throw upon it?

MR. SANDS: That, too, Your Honor, was a gambling case, involving gamblers where one gentleman was employed by a bookmaker and that gentleman made up a fictitious person and bet with his employer and then threats were used, there were actual beatings, and in that case it was held to be a

violation of this same statute, and that's from the Tenth Circuit.

There is also a decision I believe in the Third Circuit, *Keresty*, along the same line, holding that gambling debts are within the purview of this statute. The legislative history indicates that it's not just a "loan sharking" statute.

THE COURT: The legislative history says it is admitted as a constitutionally guaranteed question because it is based upon an effort to protect interstate commerce and if you can find anything in this case, anything in the charge, or anything in the evidence where interstate commerce has been affected in any way—where is interstate commerce affected by this case?

MR. SANDS: Well, first—

THE COURT: Just point out one way. Do you mean to say—

MR. SANDS: —the fact that such a large sum of money was involved, taking that sum of money out of legitimate channels of commerce. I think that's why Congress, Your Honor, decided—

THE COURT: What do you mean "channels of commerce"? Is gambling a channel of commerce?

MR. SANDS: No, no, but the money employed gambling could be employed lawfully some place else, Your Honor.

THE COURT: Is money passing between bookmakers a channel of commerce?

MR. SANDS: I am saying that the money—

THE COURT: If the Congress means to say that,

they will have to say it in plainer language than in this act. "This also includes gambling, it also includes prostitution, it also includes a murder. We're going to make every single local crime a federal crime if it involves any passage of money of any kind." If they mean that, they ought to say so and we'll get some more Congressmen.

This says here in just so many words:

> "On the basis of findings of Congress that "extortionate credit transactions adversely affect interstate commerce, this chapter dealing with extortionate credit transactions"

this wasn't any legitimate credit transaction—

MR. SANDS: Loan sharking, Your Honor—

THE COURT: —it had no force of law whatsoever. No, it's not a legitimate credit transaction. That is exactly what this says—

> "with extortionate credit transactions was sustainable as valid exercise of power of Congress to regulate insterstate commerce."

Is there anything at all that bookmakers could do to interfere with interstate commerce?

MR. SANDS: Your Honor, I think by taking such large sums of money out of the normal flow of commerce does have a very direct effect on the interstate commerce.

THE COURT: Well, you can make that point and take it up for certificate. I would like to have it appealed, if that's the way the government feels about it, but personally I think that it is not intended to cover these illegitimate, unlawful, felonious ac-

tions on the part of the individuals who gambled between themselves. It is not that kind of a case. They were trying to protect interstate commerce, that is what they said, that is their reason for passing the law and that is what the Supreme Court says in this case of *Perez* v. *United States*.

MR. SANDS: Your Honor, may I make just one more point?

THE COURT: Yes, sir.

MR. SANDS: I think if we look at the better, Mr. Green, who gave testimony indicating that his business now is in jeopardy because of his involvement with gambling to such a large extent, and one of the provisions contained in the legislation—

THE COURT: Whose fault was that? Because he was breaking the law? He's the one who broke the law. He is subject to go to the penitentiary but the government is going to come in and say, "You may go to the penitentiary, but we are not going to let another gambler threaten you because you didn't pay your just gambling debts." Now, that is going pretty far, much farther than I am going to go as a federal judge.

MR. SANDS: Thank you.

THE COURT: Let the jury come down.

(Reporter's note: The jury returned into the courtroom and resumed its place in the jury box. The names of the jurors were called by the clerk and all were present. The following then occurred:)

THE COURT: Members of the jury, under the law, when the Court is of the opinion that a case has not been made out in law it is then the duty of the trial judge to direct the entry of a judgment of acquittal. I feel that I should explain this to you. It is rather technical but not so technical that you cannot clearly appreciate the ruling.

Under the law as passed by the Congress, it is unlawful for a person to make a threat or to in any way interfere with the legitimate, interstate transactions in business. For instance, if a person takes a mortgage on a piece of property and he charges, we will say, an exorbitant rate of interest or he sells that mortgage to some other person and is taking advantage of it, known as a "loan shark"; now, the transaction was a legitimate transaction, to take a mortgage on a piece of property, that is normal business, but it is not under this law permitted that there should be an exorbitant charge or exorbitant obtaining of money through any means, threats or otherwise, because as the Congress says, such action interferes with interstate commerce. You see, this is a federal court; there must be some basis between the states. Now, this charge here of threatening to injure or kill, or whatever you may believe from the evidence actually took place, is a local offense possibly, but it doesn't interfere with interstate commerce because the man who was seeking to collect the debt had no authority in law to collect it. A gambling debt is not a debt that can be enforced in law; it is an unlawful enterprise. He was

violating the law when he took the bet. That is against the law, both of Ohio and Kentucky. It is a gambling debt and a gambling debt, a gambling transaction is not enforcible in law. So, consequently, there could be no interference with interstate commerce. Interstate commerce doesn't contemplate unlawful obtaining of money through violation of law. And so this transaction that we have here is in law—in order to permit the jury to consider whether or not this defendant violated the law, it must appear that there was a legitimate transaction, which he was seeking to extort money from, and that transaction was of such a nature that to permit him to exercise his violence was an interference with interstate commerce, but not between bookmakers, both of whom were violating the law. There was no basis of any legitimate transaction whatsoever. So, whatever offense this defendant may have committed, if any, upon the evidence in this case, was purely a local matter, addressing itself to the state of Kentucky, wherever it is alleged to have taken place, but it is not in the judgment of the Court a case that comes under this federal statute which is charged in the indictment.

So, you are directed, Mr. Clerk, to enter a judgment of acquittal and the defendant is discharged.

I, Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts of Kentucky, do certify that the foregoing constitutes a true, full and accurate transcript of the proceedings had in connection with the Court's Ruling on Motion for Directed Verdict in case No. 11,086, United States of America v. Vanis Ray Robbins, when heard in the United States District Court for the Eastern District of Kentucky, at Covington, on January 10, 1974, before His Honor, Mac Swinford, Judge of said Court.

IN TESTIMONY WHEREOF, Witness my official hand as reporter aforesaid, this the 7th day of February 1974.

/s/ Ella G. McGarvey
Official Reporter

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-67

UNITED STATES OF AMERICA, PETITIONER

v.

VANIS RAY ROBBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

After we filed our petition, the United States Court of Appeals for the Fifth Circuit decided *United States* v. *Kehoe*, 516 F.2d 78, which strongly supports the position we have taken and conflicts in principle with the decision of the court below. *Kehoe* addressed the second question reserved in *Serfass* v. *United States*, 420 U.S. 377, 394: whether the government can appeal from a mid-trial order dismissing an indictment when " 'a defendant who is af-

forded an opportunity to obtain a determination of a legal defense prior to trial * * * nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" *Kehoe* held that the government can appeal and, when appropriate, can retry the accused.

The defendants in *Kehoe* were indicted for embezzlement of land from a federally-insured savings institution, in violation of 18 U.S.C. 657. After the prosecution had rested at trial, the defendants moved for a judgment of acquittal on the ground that Section 657 does not prohibit the embezzlement of land. The district court accepted their argument and, taking the case from the jury, entered a "judgment of acquittal." Another grand jury then indicted the defendants for making a false report with intent to defraud a federally-insured savings institution, in violation of 18 U.S.C. 1006. This indictment was based on the same transactions that had been the subject of the previous indictment and trial; the district court dismissed this indictment, holding that to try the defendants under it would subject them to a prohibited additional jeopardy.

The court of appeals first concluded that the district court's order was neither a verdict nor a judgment of "acquittal" but was, instead, an order dismissing an indictment. The court's reasoning (516 F.2d at 82) was similar to the approach of our petition (Pet. 11-14): when a district court enters an order based "only on the legal sufficiency of the indictment" and takes the case away from the jury

without allowing the fact-finder to resolve any disputed facts, the court has dismissed the indictment, not "acquitted" the defendants.[1] A mid-trial order of dismissal, *Kehoe* held, should be assessed by the same standards that are applied when a court declares a mistrial after jeopardy has attached. "[T]he interest-balancing approach employed in [*Illinois* v. *Somerville*, 410 U.S. 458] is also appropriate in this [case]." *Kehoe, supra*, 516 F.2d at 85; footnote omitted. This holding, too, tracks the approach of our petition (see Pet. 8-10, 14-16).

Applying the balancing approach used in the mistrial cases, the *Kehoe* court held that defendants could be retried. Although they had been subjected to part of a trial, that trial had not placed them in danger of conviction because the jury, the only body authorized to render a verdict of guilty, never had an opportunity to do so. Nor had any questions of fact been resolved. The trial terminated at defend-

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[1] The inquiry into the proper characterization of the termination of the first trial in *Kehoe* was particularly appropriate because the government had not appealed the "judgment of acquittal," but had instead brought a new indictment. If the judgment in the first trial had been conclusive on the merits, the new indictment might have been barred by traditional principles of *res judicata* even if not barred by the Double Jeopardy Clause. See *United States* v. *Oppenheimer*, 242 U.S. 85. By concluding that the action at the first trial went only to the validity of the indictment and did not reach the merits, the court of appeals eliminated that objection to trial under the new indictment. The instant case entails no comparable obstacle, for a direct appeal was taken under 18 U.S.C. 3731; *res judicata* could not bar further proceedings because the district court's judgment has not become final.

ants' request, and in the way they sought. And, the court of appeals held (516 F.2d at 86), when defendants deliberately wait until jeopardy has attached before seeking to dismiss the indictment, they cannot object to being tried again if that is necessary to produce a single fair trial.

Kehoe does not squarely conflict with the decision below, for the instant case is not one in which respondent deliberately postponed making a motion to dismiss the indictment. But the approach of *Kehoe* conflicts with the approach of the court below, for *Kehoe* has held that, when an indictment is dismissed in mid-trial at the behest of the accused, the government can subject the accused to another trial if the interests of justice require. Whether the accused has deliberately delayed making his motion is simply one factor to be considered as part of a balancing analysis. The court below adopted a *per se* approach in the instant case, holding that an accused in respondent's position (or the position of the defendants in *Kehoe*) cannot be retried under any circumstances. We submit that, under the balancing approach of *Kehoe* and this Court's mistrial cases, the Double Jeopardy Clause does not prohibit a second trial of respondent.

Because of this conflict in principle among the circuits, in addition to the reasons stated in the petition, the petition for a writ of certiorari should be granted.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[2] We draw to the attention of the Court two other recent cases that, applying *Serfass, supra, United States* v. *Wilson*, 420 U.S. 332, and *United States* v. *Jenkins*, 420 U.S. 358, certiorari denied, 420 U.S. 925, have permitted government appeals in criminal cases. In *United States* v. *DeGarces*, C.A. 2, No. 75-1013, decided June 13, 1975, the jury had returned a verdict of guilty, but the district court entered a judgment of acquittal, holding that the evidence was insufficient. The court of appeals reversed and ordered the district court to enter a judgment of conviction. In *D'Allesandro* v. *United States*, 517 F.2d 429 (C.A. 2), D'Allesandro moved to withdraw his plea of guilty. The district court erroneously allowed him to do so, accepted a new plea, and entered a new sentence. The court of appeals reversed and ordered the district court to reinstate the old plea and sentence, citing *Wilson* and *Jenkins*. But see *United States* v. *Spinella*, 506 F.2d 426 (C.A. 5), rehearing denied, 515 F.2d 510 (C.A. 5), petition for a writ of certiorari pending, No. 75-226.

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